Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BERTRAM ROBERTS and HANNI ROBERTS,
Petitioners,

v.

FLORIDA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There is a substantial overlap between the question presented in this petition and the first question presented in the petition for a writ of certiorari in *El Paso Natural Gas Company v. Neztsosie*, No. 98-6 (discussed *infra* at 25), which was granted by this Court on October 13, 1998. The question presented in this case is:

In an action to recover damages for injuries arising from a worker's exposure to radiation at a nuclear power plant, do the Price-Anderson Act Amendments to the Atomic Energy Act preempt standards of care established by state tort law?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 146 F.3d 1305 (11th Cir. 1998), and is reproduced in the appendix at Pet. App. 1a. The opinion of the United States District Court for the Southern District of Florida is unreported and is reproduced in the appendix at Pet. App. 8a.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1998. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

42 U.S.C. 2014(hh) provides:

> The term "public liability action," as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. 2210 is set forth in full in the appendix at Pet. App. 16a.

INTRODUCTION

The Eleventh Circuit below held that federal law completely preempts state-law standards of care in a tort action involving exposure to nuclear radiation, and that an injured person may

recover only if the defendant violated the federal maximum radiation emission standards. This preemption ruling cannot be reconciled with 42 U.S.C. 2014(hh), a provision of the Price-Anderson Act that specifically adopts state-law "substantive rules for decision" in actions alleging injuries from nuclear radiation.

Although there is some conflict in lower court authority, *see infra* note 2, petitioners seek review principally on the ground that three federal courts of appeal have ignored the plain language of section 2014(hh) in favor of general concerns about encroachment on federal interests, an expansive approach to preemption that has been rejected repeatedly by this Court. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) (rejecting preemption on basis of general federal regulatory controls because Court has traditionally "look[ed] for special features warranting preemption"). Indeed, this Court has consistently repudiated broad claims of preemption in the context involved here—compensation of nuclear power plant workers. *See English v. General Electric Co.*, 496 U.S. 72 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

Recent cases demonstrate the importance of review by this Court, even in the absence of conflict among the federal circuits. *See Lexecon v. Milberg Weiss Berhsad Hynes & Lerach*, 118 S. Ct. 956 (1998) (reversing unanimous views of federal appellate and trial courts concerning multi-district litigation statute because such views were at odds with statutory text). Particularly in the context of preemption of state-law damages actions, the Court has not hesitated to grant review and reverse the prevailing view in the lower federal courts. *See,*

e.g., *Medtronic*, 518 U.S. 470 (no preemption of plaintiffs' state tort claims based on faulty medical devices, disagreeing in whole or in part with views of eight circuit courts); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 n.2 (1992) (state tort claims by cigarette smoker held generally not preempted despite unanimity of contrary federal circuit court authority); *see Lewis v. Brunswick Corp.*, 118 S. Ct. 439 (1997) (granting plaintiff's petition for writ of certiorari in boat safety tort case despite unanimity of federal authority favoring preemption).

The need for review is greater here than in the ordinary preemption case because the state courts cannot be heard on the question presented. Under the Price-Anderson Act, even though actions for damages proceed under state substantive law, 42 U.S.C. 2014(hh), federal courts have original and removal jurisdiction regardless of the amount in controversy. 42 U.S.C. 2210(n)(2). In recent years, although the federal circuit courts have been finding broad preemption of state-law tort claims, the state appellate courts have often been more sensitive to the prerogatives of state law and provided a counterbalance prior to this Court's review. *See Cipollone*, 505 U.S. at 508 n.3; *Moore v. Brunswick Bowling & Billiard Corp.* 889 S.W.2d 246 (Tex. 1994) (rejecting preemption in boat safety case prior to grant of certiorari in *Lewis v. Brunswick Corp., supra*). The absence of this potential counterbalance emphasizes the need for review now, since further percolation in the lower courts is not likely to shed additional light on the important question presented here.

STATEMENT OF THE CASE

Petitioner Bertram Roberts suffers from terminal cancer that he claims was caused by on-the-job radiation exposure at a nuclear power plant operated by the respondent Florida Power

and Light Company, where Mr. Roberts was employed as an electrician by respondent's contractor, Bechtel Corporation. Mr. Roberts, along with his wife, petitioner Hanni Roberts, sued respondent seeking damages for his injuries. The lower courts sustained respondent's motion to dismiss on the ground that petitioners' suit is preempted by the Price-Anderson Act ("PAA"), because petitioners did not claim that radiation emissions at the plant exceeded the maximum "dose" permitted by federal law.

The history and structure of the PAA are critical to understanding how the court of appeals erred in its preemption ruling. Therefore, Part A below considers that legislation in detail. Part B addresses the facts and the district court proceedings, and Part C reviews the decision of the court of appeals.

A. The Price-Anderson Act.

1. Enactment and 1966 Amendments.

The PAA was enacted in 1957 as an amendment to the Atomic Energy Act of 1954 to encourage private development of nuclear power plants. To overcome private sector reluctance to provide atomic power because of the potential for catastrophic accidents and the unavailability of private liability insurance, the PAA provided a system of compensation for injuries resulting from nuclear accidents. S. Rep. No. 218, 100th Cong., 1st Sess. 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1477; H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 4 (1987). Thus, the PAA established a system of comprehensive liability insurance for providers of nuclear energy under contract or license with the government. S. Rep. No. 70, 100th Cong., 1st Sess. 13-14 (1987), *reprinted in* 1988

U.S.C.C.A.N. 1426-27; *see generally Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64-67 (1978).

The 1957 law had three features. First, it limited the aggregate liability of private nuclear operators under contract or license with the federal government. Second, it channeled so-called "public liability" actions—those arising from nuclear accidents—by providing that any person who might be held liable for an accident would be indemnified by the federal government. Third, it required that, in cases where claims for public liability exceeded the required level of private insurance, the federal government would compensate the person held liable up to the Act's aggregate liability limit. S. Rep. No. 218, *supra* at 2, *reprinted in* 1988 U.S.C.C.A.N. 1477.

In 1966, Congress amended the PAA out of concern that the public be quickly and adequately compensated for injuries resulting from a nuclear accident by, among other things, providing for development of a compensation and distribution plan in the event that claims exceeded the Act's aggregate liability limits. S. Rep. No. 1605, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201-03. The amendments also sought to simplify the system for compensation of public liability claims and to ensure uniform treatment of claims arising out of a single nuclear accident. Thus, under the "waiver-of-defenses" provision, 42 U.S.C. 2210(n)(1), defendants in cases involving a large nuclear accident, known as an "extraordinary nuclear occurrence" ("ENO"), could be required to waive any defenses related to (1) the plaintiff's conduct or the defendant's lack of fault, (2) government or charitable immunity, and (3) the statute of limitations, if the suit were filed within three years of the date the plaintiff became aware of his injuries or damages, but no more than ten years

after the date of the nuclear incident. *See* S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3201-02; *see also* S. Rep. No. 218, *supra* at 2, *reprinted in* 1988 U.S.C.C.A.N. 1477-78. In essence, the waiver-of-defenses provision required an ENO victim "to prove only that he or his property was damaged and that such damage was caused by the nuclear incident." S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3209. As a result, for ENO claims, all jurisdictions would apply legal principles similar to strict liability. *Id.* at 3207.[1]

The 1966 amendments also created federal jurisdiction for claims involving an ENO in the district where the accident occurred. This jurisdictional provision allowed the defendants to remove actions pending in state courts and to transfer actions pending in other federal courts to the federal district court having venue. This provision thus allowed all claims arising out of a single serious nuclear accident (ENO) to be consolidated in one court. *Id.* at 3215.

2. The 1988 Amendments.

In 1988, Congress passed another set of PAA amendments, which are important to an understanding of this case. In pettitioners' view, the 1988 law underscores the error committed by the Eleventh Circuit because it explicitly adopts state substantive law in cases involving personal injury from nuclear radiation. On the other hand, respondent contends that the 1988 amendments preempt state-law duties of care in such

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[1] The Nuclear Regulatory Commission determines whether a nuclear incident is an ENO. *See* 42 U.S.C. 2014(j); 10 C.F.R. 140.81 *et seq*. The waiver of defenses based on state statutes of limitations has since been further liberalized. *See* 42 U.S.C. 2210(n)(1).

actions. Indeed, respondent conceded in its court of appeals brief that had petitioners' claims arisen prior to 1988, there would be no preemption because "persons claiming injury from radiation could file state law causes of action in state or federal courts, and could recover under any theory of liability available in any of the 50 states." Brief for Defendant-Appellee Florida Power & Light, at 16, in *Roberts v. Florida Power & Light Co.*, No. 97-5195 (11th Cir., dated Apr. 2, 1998); *see also* Pet. App. 6a n.5 (suggesting dispositive effect of 1988 amendments).

As with the 1966 amendments, the main thrust of the 1988 legislation was to improve the compensation system for victims of nuclear exposure, not to restrict or eliminate liability for power plant operators. Thus, the 1988 law extended the indemnification system for thirty years; increased the aggregate indemnification level; created an expedited mechanism to allow congressional action for additional compensation; and broadened the scope of the public compensation system to include nuclear waste disposal activities and incidents involving stolen nuclear materials. S. Rep. No. 70, *supra* at 12, *reprinted in* 1988 U.S.C.A.A.N. 1425. The amendments also clarified that lessors of nuclear facilities could not be held liable for nuclear accidents occurring in the facility and barred awards of punitive damages where the federal government would be liable for them under an indemnification agreement. H.R. Rep. No. 104, *supra*, pt. 1 at 19. This latter provision was a direct response to the Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which held that the Atomic Energy Act, as informed by the PAA, does not preempt an award of punitive damages under state tort law arising out of radiation exposure from a nuclear power plant.

The 1988 amendments also included two responses to litigation over the Three Mile Island incident. S. Rep. No. 218,

supra at 13, *reprinted in* 1988 U.S.C.C.A.N. 1488. All of the Three Mile Island suits were originally consolidated in the District Court for the Middle District of Pennsylvania, where the accident occurred. After the Nuclear Regulatory Commission ("NRC") determined that the accident was not an ENO, however, the claims were dismissed for lack of subject matter jurisdiction. *Id.* (citing *Stibitz v. GPU*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985)). To ensure that federal courts could hear all public liability claims, not just those involving ENOs, the 1988 amendments broadened the grant of federal jurisdiction to cover all nuclear incidents. *See* H.R. Rep. No. 104, *supra*, pt. 1 at 18. To do so, the amendment simply replaced "extraordinary nuclear occurrence" with "nuclear incident" in the PAA's jurisdictional provision, 42 U.S.C. 2210(n)(2). *Id.* at 50.

The amendments also defined the term "public liability action," which was not defined in the 1966 amendment granting federal jurisdiction over ENO claims. That definition included an anti-preemption clause, which specifically adopts state substantive law, presumably to ensure that the grant of federal jurisdiction would not suggest that the courts develop a body of federal substantive law. Thus, in a public liability action "the substantive rules for decision ... shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" 42 U.S.C. 2210. *See* 42 U.S.C. 2014(hh).

The "provisions" of section 2210, in turn, concern a variety of issues such as indemnification, collection of fees from NRC licensees, and regulatory reports to Congress. *See* 42 U.S.C. 2210 (reproduced at Pet. App. 16a-47a). With the exception of section 2210(s)—the provision barring punitive damages in certain circumstances—the 1988 amendments did not limit the

level of compensation to be awarded in a public liability action, much less address the substantive standard of care in such an action.

B. Factual Background and District Court Proceedings.

This suit seeks to recover money damages for injuries suffered by petitioner Bertram Roberts while working at the Turkey Point Nuclear Power Plant operated by respondent. Eleventh Circuit Record Excerpts ("RE") 9-10. Mr. Roberts alleges that his injuries were caused by radiation to which he was exposed from 1966 through 1989. RE 9. In January 1993, Mr. Roberts was diagnosed with myelogenous leukemia, a type of cancer linked to radiation exposure. RE 9-10.

Petitioners filed this case on October 10, 1995, in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida. RE Tab 2. Petitioners contended that respondent breached a duty of reasonable care owed to Mr. Roberts and his fellow workers at Turkey Point under Florida law. RE 10-11. Specifically, Mr. Roberts alleged that respondent unreasonably exposed him to more radiation than was necessary, that respondent did not help him take precautionary steps, such as providing appropriate protective clothing, and that respondent did not warn him of the danger of working at the plant. RE 11-12. The complaint also contained a strict liability claim, alleging that working with nuclear materials is an abnormally hazardous activity, giving rise to respondent's liability for Mr. Roberts's injuries. RE 13-14. Mr. Roberts's wife, petitioner Hanni Roberts, sought recovery for loss of consortium. RE 15.

Because public liability actions such as this one "arise under" federal law, *see* 42 U.S.C. 2014(hh), 2210(n)(2),

respondent removed the case to the Southern District of Florida pursuant to 28 U.S.C. 1441(a) and 1331. Thereafter, respondent moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that the PAA preempts any duty of care defined by state tort law for operators of nuclear power plants. RE Tab 3. Respondent relied specifically on 42 U.S.C. 2014(hh), even though that provision states that the substantive law in a public liability action "shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [section 2210]." Respondent argued that any duty of care defined by state tort law for nuclear facility operators would be inconsistent with radiation dose limits promulgated by the NRC and that, therefore, those limits preempt state standards of care. Respondent did not explain, however, how the Florida common-law duties on which petitioners rely are inconsistent with any of the specific provisions of section 2210.

On June 9, 1997, the district court granted respondent's motion to dismiss. Pet. App. 8a. The court held that federal nuclear safety standards preempt the duty of care defined by state tort law, and that, therefore, petitioners did not state a valid claim because they did not contend that respondent had exceeded the federal radiation dose limits. Pet. App. 13a-15a. The court relied heavily on *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994), which had come to the same conclusion. The district court did not, however, point to any provision of the Atomic Energy Act, or its PAA amendments, that deals with, let alone expressly preempts, state-law standards of care in public liability actions.

C. The Eleventh Circuit's Decision.

The Court of Appeals for the Eleventh Circuit affirmed per curiam. Pet. App. 1a. The court began by briefly recounting the purpose and history of the Atomic Energy Act and the PAA. Pet. App. 2a-3a. It then correctly identified petitioners' principal basis for reversal of the district court's decision: that 42 U.S.C. 2014(hh) specifically preserves state-law rules for decision in nuclear injury cases, including the state-law duty of care. Pet. App. 5a. The court did not, however, answer this statutory argument, but simply stated that the federal government's exclusive role in regulating the safety of nuclear technology extended to actions for damages as well as to state legislative efforts, citing this Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *See* Pet. App. 5a-6a. The court relied on *Silkwood* despite its holding that an award of punitive damages in a wrongful death action arising from nuclear plant radiation was *not* preempted by the Atomic Energy Act.

Ignoring section 2014(hh)'s express adoption of state substantive law, the court of appeals stated that "federal regulations must provide the sole measure of the defendants' duty in a public liability action" because of the federal government's pervasive role in nuclear regulation. Pet. App. 6a (quoting *O'Conner*, 13 F.3d at 1105). The court of appeals concluded that, unless petitioners could prove that respondent exposed Mr. Roberts to radiation in violation of the maximum federal limits, petitioners' claims under Florida law were preempted. Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

Review should be granted because the Eleventh Circuit, joining the Seventh and Third Circuits, *see O'Conner*, 13 F.3d 1090; *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 858-66 (3d Cir. 1991), has seriously misread the Price-Anderson Act and particularly its provision defining "public liability action," which specifically preserves, rather than preempts, state-law duties of care. Compounding this grievously wrong construction of the PAA is the court of appeals' misunderstanding of *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which reached a conclusion at odds with the decision below.

Review is also warranted because of the manifest importance of the question presented. If the decisions of the courts of appeals are permitted to stand, both atomic plant workers and people living in surrounding communities will be deprived of compensation for their radiation-related injuries.[2]

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[2] Although the majority of lower court rulings, including the decisions of the Seventh Circuit in *O'Conner*, and of the Third Circuit in *TMI II*, hold that federal regulations preempt state-law standards of care, the case law is not unanimous on the question. Most prominently, on remand from this Court in *Silkwood*, the defendant sought to avoid liability because of its compliance with federal regulations. The Tenth Circuit flatly rejected that argument on the basis of this Court's ruling, holding that the "Supreme Court was well aware" of the defendant's "substantial compliance" when it made its no-preemption ruling. *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1456-57 (10th Cir. 1985); *see also id.* at 1457 (because "both of the [*Silkwood*] dissents treated the majority opinion as holding that compliance with federal regulations does not preclude the award of punitive damages under state law principles of tort," defendant's position is a "non sequitur" in light of the Supreme Court's ruling). In addition, Judge Scirica,

(continued...)

A. THE DECISION BELOW CONFLICTS WITH THE PRICE-ANDERSON ACT AND THIS COURT'S DECISION IN *SILKWOOD*.

1. Because the "touchstone" of any preemption analysis is congressional intent, as reflected in the language that Congress enacts, *Cipollone*, 505 U.S. at 516, we turn first to the relevant statutory text:

> The term "public liability action," as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and *the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.*

42 U.S.C. 2014(hh) (emphasis added).

(...continued)
concurring in *TMI II*, strongly suggested that state law, rather than federal regulations, provide the duty of care in public liability actions, based on his reading of 42 U.S.C. 2014(hh) and *Silkwood*. *See TMI II*, 940 F.2d at 863-64, 870-71 & n.3. Moreover, lower federal courts have issued rulings that support petitioners. *See In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1570-79 (E.D. Wash. 1991); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1471 (D. Colo 1991); *Building & Constr. Trades Dep't v. Rockwell Int'l Corp.*, 756 F. Supp. 492, 493 (D. Colo. 1991), *aff'd* 7 F.3d 1487 (10th Cir. 1993)(Table); *see also Landry v. Florida Power and Light*, 799 F. Supp. 94, 96 n.7 (S.D.Fla. 1992) (noting "split of authority" between Tenth Circuit and Third Circuit on question whether plaintiff must show violation of federal radiation standards), *aff'd*, 998 F.2d 1021 (11th Cir. 1993) (Table).

The most striking feature of section 2014(hh) is that, in the main, it is an *anti*-preemption provision, under which state law provides "the substantive rules for decision" except where it is "inconsistent" with 42 U.S.C. 2210. *Cf. California Fed'l Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-82 (1987) (analyzing similar anti-preemption provision). Therefore, to understand the preemptive scope of the PAA, it is necessary to examine section 2210 to determine the precise subjects that it affects.

Generally-speaking, section 2210 establishes the PAA's insurance and indemnification scheme, which ensures that funds will be available to compensate victims of a nuclear incident. There are a few provisions of section 2210—none of which is applicable here—in which Congress altered state tort law: the limitation on aggregate public liability, 42 U.S.C. 2210(e); the provision requiring NRC licensees to waive any issue or defense based on state statutes of limitations, on defendant fault or plaintiff conduct, and on government or charitable immunity, 42 U.S.C. 2210(n)(1); the limitation on the liability of nuclear facility lessors, 42 U.S.C. 2210(r); and the bar on punitive damages where the United States is obligated to make payments under an indemnity agreement, 42 U.S.C. 2210(s). Other than these provisions, no elements of state tort law are mentioned in section 2210. *See El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 617 (9th Cir. 1998) (recognizing narrow, targeted approach of section 2210), *cert. granted*, No. 98-6 (U.S.), discussed *infra* at 25.

Section 2210's exceptions to state-law rules of decision can be explained in large part by Congress's decision to treat ENOs differently from ordinary nuclear incidents such as that alleged by petitioners. An ENO is an occurrence that the NRC determines "has resulted or will probably result in substantial

damages to persons offsite." 42 U.S.C. 2014(j). Because of the potential for massive liability, the PAA sets an aggregate liability limit for a particular incident, 42 U.S.C. 2210(c), which was intended to deal with catastrophic accidents. *See Duke Power*, 438 U.S. at 83 (citing S. Rep. No. 291, 85th Cong., 1st Sess. 15 (1957)). The waiver-of-defenses provision, 42 U.S.C. 2210(n)(1), seeks to impose strict liability, abrogate defenses based on plaintiff conduct, and alter state rules on statutes of limitations *only* with respect to ENOs. No such abrogation of state-law rules exist for non-ENOs because Congress was seeking both to facilitate claimant recovery and to control aggregate liability solely in cases involving a nuclear calamity. *See Duke Power*, 438 U.S. at 83-84.

Given these purposes, it is not surprising that the occupational radiation dose limits upon which respondent relied below for preemption, *see* 10 C.F.R. 20.1201-.1208, are not even based on the PAA generally, let alone on section 2210 in particular. Rather, as the NRC has noted, the dose limits are authorized by provisions of the Atomic Energy Acts of 1946 and 1954. *See* 10 C.F.R. Part 20, at p. 281 (1998) (citing 42 U.S.C. 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2232, 2236 as "Authority"). In sum, section 2014(hh)—the sole provision that concerns applicable law in a public liability action—explicitly preserves, rather than preempts, petitioners' claims based on a state-law duty of care.

Because the text of the PAA is clear, leaving no doubt that state standards of care are not preempted, there is no need to consult the Act's legislative history. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). In any event, the PAA's legislative history repeatedly confirms its plain meaning and Congress's desire to adopt state standards of care in public liability actions. The overriding purpose of both the 1966 and

the 1988 PAA amendments was to ensure that federal courts would have *jurisdiction* over claims arising from nuclear incidents, not that federal substantive law would apply. Indeed, in passing the 1966 amendments, Congress explicitly decided not to enact substantive law (*i.e.*, a new body of federal tort law). S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3209. Rather, the approach taken by Congress was

> in keeping with the approach followed in enacting the original Price-Anderson Act—namely, *interfering with State law to the minimum extent necessary*. In essence, the plan adopted permits the *retention of State law* with respect to the cause of action and the measure of damages, but the requirements specified for the insurance contracts and the indemnity agreements provide the uniform rules needed to accomplish the bill's objectives. . . . *[T]his is not a measure designed either to accomplish a general revision of American tort law* or to set precedents for activities in other fields.

Id. (emphasis added).

The legislative history of the PAA's 1988 amendments emphasizes the same theme. Prior to 1988, no court had ever held that a personal-injury claim against a nuclear plant operator was preempted by the PAA. As respondent conceded below, cases such as petitioners' were governed by state law and, because federal question jurisdiction did not exist, were litigated in state court absent diversity. *See Stibitz*, 746 F.2d at 995-97. Although one of the purposes of the 1988 amendments was to broaden the grant of federal jurisdiction to cover all nuclear incidents, not just catastrophic accidents, those amendments did not supplant state substantive law. Instead,

Congress's intent was to provide a single forum for such litigation and to avoid the confusion that occurred in the wake of the Three Mile Island incident. *See* S. Rep. No. 218, *supra* at 13, *reprinted in* 1988 U.S.C.C.A.N. 1488. Thus, "[r]ather than designing a new body of substantive law to govern [public liability actions], ... the substantive rules for decision [were to] be derived from the law of the state in which the nuclear incident involved occurs." H.R. Rep. No. 104, *supra*, pt. 1 at 18. There is much more similar legislative history, *see, e.g.*, S. Rep. No. 70, *supra* at 20, *reprinted in* 1988 U.S.C.C.A.N. at 1433; H.R. Rep. No. 104, *supra*, pt. 1 at 5, and, to our knowledge, none to the contrary.

2. The courts of appeals have responded to the language of sections 2014(hh) and 2210 in two ways. First, they have found that section 2014(hh) preempts state-law duties of care, despite its explicit adoption of state-law "substantive rules for decision," on the ground that section 2014(hh)'s "inconsistent with" language somehow incorporates the whole body of federal law concerning nuclear energy, rather than what the provision actually says: that state substantive law applies unless it is inconsistent with the "provisions of" 42 U.S.C. 2210. *See, e.g., O'Conner*, 13 F.3d at 1100-01 (question is "whether the applicable state law is consistent with federal law").

Some courts, however, including the Eleventh Circuit below, have rejected that reading of the statute. Pet. App. 3a; *see also, e.g., Lujan v. Regents of Univ. of California*, 69 F.3d 1511, 1518 (10th Cir. 1995) (indicating that "inconsistent with" language refers only to section 2210). Rather, those courts have largely ignored the express language of the PAA and held that state-law duties of care are impliedly preempted by the federal government's alleged occupation of the field of nuclear safety, which creates a conflict between state-law tort standards and

federal nuclear safety objectives. *See* Pet. App. 5a-7a; *TMI II*, 940 F.2d at 859; *see also, e.g., Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 220 (D. Me. 1996). This reliance on implied preemption doctrine is flawed for several reasons.

First, Congress is presumed to carry out its policies through the text of enacted legislation. Thus, where Congress has expressly addressed preemption in a particular provision of an Act, that provision is assumed to be a "reliable indicium" of congressional intent. *Cipollone*, 505 U.S. at 517. Although this presumption "does not . . . entirely foreclose[] any possibility of implied preemption," *Freightliner Corp.*, 514 U.S. at 288, an "express definition of the pre-emptive reach of a statute 'implies'—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters." *Id.* This fidelity to legislative text is merely a variant on the canon *expressio unius est exclusio alterius*. *Cipollone*, 505 U.S. at 517. As shown above, only one provision of the PAA—section 2014(hh)—addresses the role of state law in public liability actions, and that provision preserves, rather than preempts, state-law standards of care.

There is no reason to believe that Congress intended any further preemption of state tort law here, and that ought to be the end of the matter. Indeed, because section 2014(hh) is, in the main, an *anti*-preemption provision, this case is unlike the ordinary preemption case, where the principal purpose of the statutory provision under scrutiny is to displace state law and the only question is the scope of that displacement. *See, e.g., Medtronic*, 518 U.S. at 484-85. Here, section 2014(hh) directs the courts to apply state substantive law, except where Congress, in section 2210, decided that limited and specific state tort-law principles would conflict with the goals of

national nuclear policy: the waiver of defenses for ENOs, the limitation on aggregate public liability, the bar on liability of lessors of nuclear facilities, etc. Thus, section 2014(hh) *itself* declares adherence to the rule of *expressio unius est exclusio alterius* and demands that no further incursions on state law take place. In short, in light of the carefully delineated anti-preemptive scheme of section 2014(hh), there is no room for implied preemption here. *Accord California Fed'l*, 479 U.S. at 282 (similar anti-preemption provision under Title VII of the Civil Rights Act provided "reliable indicium" of Congress's intent on preemption question); *id.* at 295-96 (Scalia, J., concurring) (in light of anti-preemption provision, Court should do no more than conduct analysis required by that provision).

Second, the notion that the Atomic Energy Act impliedly preempts a state-law duty of care regarding radiation emissions conflicts with this Court's decision in *Silkwood v. Kerr-McGee*, *supra*. In that case, the plaintiff was a nuclear plant employee who sought damages from radiation exposure. The defendant argued that the entire action was preempted by, among other things, the federally-determined maximum dose levels. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 572-77 (W.D. Okla. 1979). A jury awarded both compensatory and punitive damages, and the trial court emphatically rejected the defendant's argument that federal radiation dose levels were controlling and therefore preempted different state-law liability rules. *Id.* at 577. The Tenth Circuit affirmed in part and reversed in part the jury's compensatory award on non-preemption grounds, but held that an award of punitive damages was preempted on the ground that it would improperly punish the defendant contrary to federal interests in regulating nuclear emissions. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 922-23 (10th Cir. 1981).

This Court granted review on the punitive damages question alone. The defendant renewed its argument that applying state law "would invite[] the jury to award punitive damages irrespective of Kerr-McGee's compliance with [federal] AEC regulations." *See* Brief for Appellee Kerr-McGee Corp. at 34, *Silkwood v. Kerr-McGee Corp.*, No. 81-2159 (U.S. filed June 29, 1983). Nevertheless, the Court reversed, holding that, even with respect to punitive damages, the plaintiff's claims were not preempted. *Silkwood*, 464 U.S. at 250-58. The Court so held despite its acknowledgement that the defendant had in many respects complied with federal regulations, including federal requirements concerning radiation exposure levels. *Id.* at 244. The dissenting justices specifically pointed to this compliance as a justification for preemption of punitive damages. *Id.* at 261-62 & nn.2-5 (Blackmun, J., dissenting) (citing federal regulations, including dose standards); *see also id.* at 276-77 (Powell, J., dissenting). But all nine Justices agreed that, with respect to compensatory damages, such as those sought by petitioners here, there was no conflict between federal and state law and hence no preemption of any state-law cause of action. *See id.* at 275-76 & n.3 (Powell, J., dissenting); *id.* at 263-64 & n.12 (Blackmun, J., dissenting).

Third, in light of the broad role that Congress has mandated for state substantive law under the PAA, displacement of state common-law standards of care cannot be justified on the ground that federal law "occupies the field" of nuclear safety. Nonetheless, three circuit courts, including the court below, have held otherwise, relying principally on this Court's decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). *See* Pet. App. 2a; *TMI II*, 940 F.2d at 859; *O'Conner*, 13 F.3d at 1104.

To be sure, in *Pacific Gas*, the Court intimated that there was no room for state regulation of nuclear safety. 461 U.S. at 205. However, the very next Term, *Silkwood* held that the preemptive effect of the PAA should "*not* be judged on the basis that the Federal Government has so completely occupied the field of nuclear safety that state remedies are foreclosed." 464 U.S. at 256 (emphasis added). To the contrary, the Court said that

> it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, *in whatever form they might take*, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages *based on its own law of liability*. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. (emphasis added); *see also Goodyear Atomic*, 486 U.S. at 186 (characterizing *Silkwood*: "Congress was willing to accept

regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted").

Finally, the lower courts' invocation of conflict preemption is erroneous, since respondent's compliance with a more stringent state-law standard of care would not violate federal law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Indeed, this Court's decisions make clear that, in our system of dual sovereignty, there is nothing incongruous about allowing a state-law damages action to go forward where the defendant has complied with federal regulatory law. The principal purpose of state tort law is to provide compensation for plaintiffs' injuries, not to regulate defendants' future conduct. Thus, "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *California v. Arc Am. Corp.*, 490 U.S. 93, 105 (1989) (citing *Silkwood*, 464 U.S. at 257-58).

Even when construing statutes that contain express preemption clauses, the Court has acknowledged that "[t]here is no general, inherent conflict between [express] federal pre-emption of state [regulatory] requirements and the continued vitality of state common law damages actions." *Cipollone*, 505 U.S. at 518 (despite preemption of state labeling laws by Federal Cigarette Labeling and Advertising Act of 1965, no preemption of state common-law claims premised on duty to provide warning over and above federally-mandated label); *Medtronic*, 518 U.S. at 497-502 (no preemption of state common-law defective manufacture and duty-to-warn claims regarding medical devices despite comprehensive federal manufacturing and warning regulations).

Presumably, this principle applies with greater force here where the relevant statutory provision, 42 U.S.C. 2014(hh), preserves, rather than preempts, state law. Thus, in the nuclear power context, although the states may not directly regulate plant operations, *see generally Pacific Gas*, 461 U.S. 190, the Court has allowed nuclear plant workers to recover extra compensation awards premised on violations of state regulations that go beyond federal law. *Goodyear Atomic*, 486 U.S. at 186. And, in *Silkwood*, the Court permitted the imposition of a large punitive damages award against a power plant despite its compliance with NRC regulations. 464 U.S. 238.

The lack of conflict between a state-law damages action and federal regulatory objectives is underscored here by the dual nature of the federal dose requirements. The regulations set maximum permissible dose limits, which form a ceiling for exposure levels permitted by the NRC. 10 C.F.R. 20.1201(a). The federal regulations also recognize that the federal maximum radiation levels may not provide adequate protection from radiation exposure: "The licensee shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)." 10 C.F.R. 20.1101(b); *see also Silkwood*, 464 U.S. at 243 & n.6 (describing ALARA); 10 C.F.R. 20.1003 (defining ALARA). Thus, state standards of care provide another incentive for nuclear power plant operators to decrease the levels of radiation emitted at their plants, and as such, they further, rather than undermine, federal nuclear safety objectives.

In sum, the Court should grant review because the decision below exacerbates a trend in circuit court precedent that is

demonstrably at odds with the text of the Price-Anderson Act, this Court's decision in *Silkwood*, and governing preemption principles.

B. THE ISSUE PRESENTED IS IMPORTANT.

The importance of the question presented cannot be seriously disputed. In the court below, the Nuclear Energy Institute—which described itself as the principal organization representing the interests of the nuclear industry, including all operators of NRC-licensed plants and all manufacturers of nuclear reactors—explained that this case raises very serious issues that are "critically important" to the NEI and its members, some of whom are involved in other litigation presenting the same question as that presented here. *See* Motion of the Nuclear Energy Institute for Leave to File a Brief Amicus Curiae in Support of Appellee, at 2-3, in *Roberts v. Florida Power & Light Co.*, No. 97-5195 (11th Cir., dated Apr. 2, 1998).[3]

Of greater concern than the interests of the nuclear industry is the impact of the three circuit court preemption rulings on people injured by radiation. The federal maximum radiation standards that respondent claims preempt state-law duties of care govern radiation exposure for people in surrounding communities as well as for plant workers. *See* 20 C.F.R. 20.1201-.1208 (occupational); 20 C.F.R. 20.1301-.1302 (members of the public). Thus, the decision below, like the decisions of other courts that have held state-law duties of care

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[3] Petitioners opposed NEI's motion to an appear as *amicus* on the ground that respondent was a member of NEI, and the Eleventh Circuit denied the motion.

preempted, profoundly affects the lives of those harmed by radiation and undermines the traditional role of the states in setting standards by which their citizens obtain compensation for their injuries. These significant consequences underscore the need for review by the Court.

* * *

On October 13, 1998, this Court granted certiorari in *El Paso Natural Gas Company v. Neztsosie*, No. 98-6 (U.S.). The issue in *El Paso* is whether, in light of the PAA's grant of original and removal jurisdiction for public liability actions to the federal courts, 42 U.S.C. 2210(n)(1), tort actions alleging injuries from nuclear radiation can be maintained in Indian tribal courts. In the first question presented in *El Paso*, the petitioners contend that the tribal court improperly asserted jurisdiction because the plaintiffs' claims are preempted by federal law. *See* Pet. for Writ of Cert. in No. 98-6, at (i) (filed June 26, 1998). In support of review on that question, the *El Paso* petitioners relied on the decisions in *O'Conner*, *TMI II*, and the court of appeals below. *See* Reply Br. for Petitioners in No. 98-6, at 2-3 (filed Sept. 25, 1998); *see also El Paso*, 136 F.3d at 621 (Kleinfeld, J., dissenting) (relying on *O'Conner* and *TMI II* in arguing that tribal court did not have jurisdiction). In our view, this Court need not reach the preemption issue in *El Paso*, because the question of the federal courts' *jurisdiction* is separate from the question of the substantive duty of care in a public liability action, whichever court has jurisdiction. However, because of the substantial overlap between the issue as presented by the petitioners in *El Paso* and the question presented here, and because this petition indisputably presents the preemption issue, we urge the Court to grant this petition and set the matter for argument in conjunction with the argument in *El Paso*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 17, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BERTRAM ROBERTS, HANNI ROBERTS,
Plaintiffs-Appellants,
v.
FLORIDA POWER & LIGHT COMPANY,
A Florida Public Utility Corporation,
Defendant-Appellee.

No. 97-5195

July 22, 1998

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

Bertram and Hanni Roberts filed this tort action in the Circuit Court of Dade County, Florida against Florida Power & Light ("FPL"), alleging that Bertram Roberts developed leukemia as a result of exposure to radiation at FPL's Turkey Point Nuclear Plant. FPL removed the case to the United States District Court for the Southern District of Florida and subsequently moved to dismiss for failure to state a claim. The district court granted that motion. We affirm.

I. BACKGROUND

Over the past 50 years, Congress has established a comprehensive federal framework governing the nuclear power industry, beginning with the enactment of the Atomic Energy Act in 1946. That statute granted the federal government a monopoly on the development of nuclear power. Congress

subsequently determined that it was in the national interest to encourage the private sector to participate in this effort. Toward that end, the Atomic Energy Act of 1954 established the Atomic Energy Commission and gave it authority to license and regulate nuclear power plants. See 42 U.S.C. § 2011 et seq. Private power companies were reluctant to invest in nuclear facilities, however, because of concerns about their liability. To address that problem, Congress enacted the Price-Anderson Act in 1957. That statute contained three main features: it (1) established a limit on the aggregate liability of those who wished to undertake activities involving the handling of nuclear material, 2) channeled public liability resulting from nuclear incidents to the federal government and 3) provided that all public liability claims above the amount of required private insurance would be indemnified by the federal government. See Pub.L. 85-256, 71 Stat. 576 (1957).

After several further changes to the statute, Congress passed the Price-Anderson Amendments Act of 1988 ("the Amendments Act"), creating an exclusive federal cause of action for radiation injury. The statute defines a "public liability action" as any suit asserting public liability growing out of exposure to nuclear radiation, 42 U.S.C. § 2014(hh), and defines "public liability" as any legal liability arising out of or resulting from a nuclear incident[1] or precautionary evacuation, id. at 2014(w). The Amendments Act also provided for the removal of, and

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[1] A "nuclear incident" is defined in part "as any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or without the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material ...." 42 U.S.C. § 2014(q).

original federal jurisdiction over, claims for any nuclear incident. 42 U.S.C. § 2210(n)(2).[2] Congress further required that the substantive rules of decision to be applied by the courts in such cases "shall be derived from the law of the state in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" section 2210 of the Price Anderson Act.[3] 42 U.S.C. § 2014(hh). One of the principal issues arising out of these hybrid actions is whether state tort standards of care are consistent with federal radiation exposure regulations or are inconsistent and, thereby, preempted.[4]

II. FACTS AND PROCEEDINGS IN THIS CASE

Bertram Roberts was employed as an electrician by FPL at its Turkey Point Nuclear Plant from 1966 to 1989. He developed myelogenous leukemia in 1993 after his retirement. Roberts and his wife, Hanni Roberts, filed this action against FPL contending that his disease resulted from his exposure to radiation at the plant. The complaint asserted causes of action

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[2] Prior to the passage of the Amendments Act, the grant of federal jurisdiction and right of removal were available only in actions resulting from an extraordinary nuclear occurrence.

[3] While the statute actually reads "unless such law is inconsistent with the provisions of such section," "such section" can only reasonably be interpreted to mean § 2210.

[4] The plaintiffs contend that the traditional Florida tort law standards for negligence, strict liability and loss of consortium claims should govern this action. The detailed federal standards for protection against radiation are found at 10 C.F.R. §§ 20.1001-20.2402.

for negligence, strict liability and Hanni Roberts' claim for loss of consortium. Since this was a public liability action within the meaning of the Amendments Act, the district court had original jurisdiction over all the plaintiffs' allegations of liability, and FPL timely removed the action to that court.

FPL then moved to dismiss the case because the plaintiffs had failed to allege an essential element of a public liability action, to wit: for a negligence claim, exposure to radiation in excess of the permissible "dosage" levels set by federal regulation; or, for a strict liability cause of action, offsite exposure from an event declared to be an extraordinary nuclear occurrence by the Nuclear Regulatory Commission. Since there was no extraordinary nuclear occurrence involved in this case, the district court concluded that, to state a negligence claim under the Amendments Act, the plaintiffs must allege and prove that the defendant breached its duty of care by exposing Bertram Roberts to an amount of radiation in excess of federally defined permissible radiation dose standards. In other words, state standards of care were preempted by federal regulatory standards in cases involving exposure to radiation. Since the plaintiffs had failed to allege that Bertram Roberts had been exposed to such excessive levels of radiation, the court granted FPL's motion to dismiss. The plaintiffs filed this appeal from that order.

III. STANDARD OF REVIEW

We review the dismissal of a complaint for failure to state a claim for relief de novo, accepting all allegations in the complaint as true and construing those allegations in the light most favorable to the plaintiffs. Lopez v. First Union National Bank of Florida, 129 F.3d 1186, 1189 (11th Cir. 1997). A complaint may not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no

set of facts in support of their claim which would entitled them to relief. Id.

IV. DISCUSSION

On appeal, the plaintiffs maintain that, rather than preempting state law standards of care, the language of § 2014(hh), quoted above, actually preserves them. They assert that the section preempts state law only to the extent it is inconsistent with § 2210, which governs, inter alia, indemnification for plant operators, abrogation of certain defenses in public liability actions and limitations on aggregate liability. They argue that § 2210 does not even mention radiation exposure limits and further contend that, since the statute is so clear on this point, there is no need to inquire whether it impliedly preempts state standards of care. They also urge that, even if that inquiry were to be undertaken, there is no inconsistency between the federal standard and common-law tort standards but, rather, that the state tort standards further federal objectives in this area.

FPL, on the other hand, urges that the comprehensive federal nuclear regulatory framework completely preempts the field of nuclear safety, in keeping with the clear language of § 2014(hh), and any state law rule of decision which is inconsistent with this statutory and regulatory framework has no force or effect.

The Supreme Court has concluded that "the safety of nuclear technology [is] the exclusive business of the Federal Government ...." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 208, 103 S. Ct. 1713, 1724, 75 L. Ed. 2d 752 (1983). This holding was reaffirmed one term later in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). In that case, the Court held that "states are

precluded from regulating the safety aspects of nuclear power." *Id.* at 240-41, 104 S. Ct. at 617.[5] The result is, as the Seventh Circuit Court of Appeals has observed, "state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law." O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1105 (7th Cir.), cert. denied, 512 U.S. 1232 (1994).

Turning to the precise question presented by this case, virtually every federal court to consider the issue, including three circuit courts of appeals, have held that "federal regulations must provide the sole measure of the defendants' duty in a public liability cause of action." O'Conner, 13 F.3d at 1105; see also Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997); In re TMI Litigation Cases Consol. II, 940 F.2d 832 (3d Cir. 1991).[6] This is because "any state duty would infringe upon

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[5] The plaintiffs contend that the Supreme Court's decision in Silkwood actually supports their position because the court held that even an award of punitive damages against a nuclear plant operator was not preempted by federal radiation dose regulations. As FPL points out, however, *Silkwood* was brought as a diversity tort action governed by Oklahoma law which was filed a decade before the enactment of the Amendments Act and the creation of the public liability action. Moreover, Silkwood's exposure to radiation in her apartment was two and one-half times the amount permitted by federal regulations. See Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 583 (W.D. Okla. 1979).

[6] Because the Amendments Act provides that state law shall provide the substantive rules of decision in a public liability action, at least one court has begun its analysis by trying to determine if the state would apply the federal regulations as an

(continued...)

pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law." TMI, 940 F.2d at 859. Moreover, the federal statutory scheme limits the liability of operators of nuclear power facilities and provides for indemnification but does so against a stringent regulatory background. Therefore, as the Seventh Circuit Court of Appeals noted, "[i]mposing a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved." O'Conner, 13 F.3d at 1105. Consequently, we join those courts in holding that federal safety regulations conclusively establish the duty of care owed in a public liability action. As the plaintiffs have failed to allege that FPL breached its duty of care by exposing Bertram Roberts to an amount of radiation in excess of the maximum permissible amount allowed by federal regulation, they have failed to state causes of action for negligence, strict liability or loss of consortium. See, e.g., McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977)(en banc).

The judgment of the district court is AFFIRMED.

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[6](...continued)
absolute standard of care for a negligence action. O'Conner, 13 F.3d at 1103. The court went on to conclude, however, that even if the state would not do so, the federal safety standards would preempt the application of a state standard of care. *Id.* at 1105. Since we concur with the latter conclusion, we need not reach the question whether Florida would apply the federal regulations as the standard of care in a negligence action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
[FILED JUNE 9, 1997]
CASE NO. 95-2508-CIV-NESBITT

BERTRAM ROBERTS and HANNI ROBERTS,

Plaintiffs,

vs. **ORDER OF DISMISSAL**

FLORIDA POWER & LIGHT COMPANY,
a Florida Public Utility Corporation,

Defendant.

This cause comes before the Court upon Defendant's Motion to Dismiss Complaint, filed November 28, 1995 (D.E. #3).

On approximately October 10, 1995, Plaintiffs filed their Complaint in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. On November 13, 1995, Defendant ("FPL") removed this action on the grounds that Plaintiffs, claims arise under the Atomic Energy Act, 42 U.S.C. § 2201 et seq.

Plaintiffs, a married couple, allege that from 1966 through 1989, Plaintiff Bertram Roberts was exposed to nuclear radiation while he worked at FPL's Turkey Point Nuclear Power Plant in Dade County. Plaintiffs claim that as a result of this radiation exposure, Mr. Roberts developed myelogenous leukemia. Plaintiffs' Complaint is comprised of three claims: Count I is a negligence claim; Count II is a strict liability claim; and Count III is Hanni Roberts' claim for loss of consortium.

On November 28, 1995, FPL filed its Motion to Dismiss. Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989). However, the Court is confined to a review of the allegations pled in the complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the nonmovant. See Quinones v. Durkis, 638 F. Supp. 856, 858 (S.D. Fla. 1986). Thus, a court may dismiss a claim pursuant to Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The parties agree[1] that in order to state a cause of action for exposure to nuclear radiation, Plaintiffs must plead a, "public liability action" under the Price-Anderson Amendment Act of 1988, 42 U.S.C. § 2011 et seq. A "public liability action" is "any suit asserting" "legal liability arising out of or resulting from a nuclear incident[2] or precautionary evacuation." 42 U.S.C.

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[1] See Plaintiff's Memorandum in Opposition, D.E. #8, at 2 ("Plaintiffs do not contest the correctness of this statement.").

[2] A "nuclear incident" is defined, in part, as

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct

(continued...)

§ 2014(hh) & § 2014(w).[3]

FPL contends that in order to properly plead a public liability action arising out of or resulting from a nuclear incident, a plaintiff must allege that a defendant breached its duty of care by permitting the plaintiff to be exposed to an amount of radiation in excess of federally defined permissible radiation dose standards. Because Plaintiffs have failed to make such an allegation, FPL argues that the Court should dismiss Plaintiffs' claims.

In response, Plaintiffs contend that federal dose standards do not define FPL's sole duty of care. Instead, Plaintiffs contend that the Price-Anderson Amendments Act does not expressly or impliedly preempt state law tort standards, and that the Act incorporates substantive state law in its entirety. Therefore, Plaintiffs contend that they may plead a Public Liability cause of action based upon state common law standards regarding FPL's duty of care, without alleging a breach of FPL's duty to comply with federal radiation dose standards.

The Court must determine whether federal safety regulations, and particularly federal radiation dose standards, establish FPL's sole duty of care for Plaintiffs' negligence, strict

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[2](...continued)
material . . . .

42 U.S.C. § 2014(q).

3 See also O'Conner v. Commonwealth Edison Company, 13 F.3d 1090, 1096 (7th Cir. 1994) ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act.") (quoting S.Rep No. 218, 100th Cong., 1st Sess. 13 (1987), reprinted in 1988 U.S.C.C.A.N. 1424, 1476, 1477).

liability, and loss of consortium claims. In other words, the Court must determine whether liability is precluded in the absence of a violation of federal radiation dose standards.

Pursuant to 42 U.S.C. § 2014(hh) of the Price-Anderson Amendments Act, the substantive rules for decision in a public liability action "shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" § 2210 of the Price-Anderson Amendment Acts. Essentially, Plaintiffs contend that Florida negligence, strict liability, and loss of consortium claims which are not based upon violations of federal radiation dose standards are not inconsistent with the Price-Anderson Amendments Act. Thus, Plaintiffs assert that they can maintain their claims based upon Plaintiff Bertram Roberts's exposure to levels of radiation that were below maximum permissible dose levels set by federal safety standards.

In order to properly address FPL's motion, the Court "must look at the [Price-Anderson] Amendments Act in the context of the entire federal statutory scheme of nuclear power." O' Conner v. Commonwealth Edison Co. , 13 F. 3d 1090, 1095 (7th Cir. 1994), cert. denied, 114 S.Ct. 2711 (1994). The Atomic Energy Act, enacted in 1946, "initially gave the federal government a monopoly with respect to the development of nuclear power." Id. However, Congress later decided to include the private sector in the development of atomic energy. Id. Therefore, "Congress enacted the Atomic Energy Act of 1954 which established the Atomic Energy Commission and gave it authority to license and regulate nuclear facilities." Id.

Because the Atomic Energy Act of 1954 "did not spur the private sector into the industry . . . , " id. , in 1957 Congress responded "with the Price Anderson Act for the purpose of 'protect [ing] the public and encourag[ing] the development of the atomic energy industry.'" Id. (quoting 42 U.S.C. § 2012). The Act

> had three main features: 1) It "established a limit on the aggregate liability of those who wished to undertake activities involving the handling or use of radioactive materials"; 2) It channeled public liability resulting from nuclear incidents to the federal government; and 3) It established that all public liability claims above the amount of required private insurance "protection would be indemnified by the Federal Government, up to the aggregate limit on liability.

Id. (quoting S.Rep. No. 218. 100th Cong., 1st Sess. 2 (1987), reprinted in U.S.C.C.A.N. 1424, 1476, 1477).

In 1966, Congress amended the Act in two important respects. First, "a new provision required that those indemnified waive common law defenses in the event of an action arising from an extraordinary nuclear occurrence ('ENO')." Id. Second, the amendments "provided for the transfer, to a federal district court, of all claims arising out of an extraordinary nuclear occurrence." In re TMI Litigation Cases Consolidated II, 940 F.2d 832, 852 (3d Cir. 1991), cert. denied, 112 S.Ct. 1262 (1992) (citing 42 U.S.C. § 2210(n)(2)). See also O'Conner, 13 F.3d at 1095.

In 1975 and again in 1988, Congress amended the Price-Anderson Act. O'Conner, 13 F.3d at 1095. "Among other provisions, the [1988 Price-Anderson] Amendments Act expanded the reach of 42 U.S.C. § 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any nuclear incident,' instead of actions arising only from [extraordinary nuclear occurrences]." Id. Therefore, 42 U.S.C. § 2210(n)(2) now provides:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place

> . . . shall have original jurisdiction . . . . Upon motion of the defendant . . . , any such action pending in any State court..... shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2). FPL removed this action on the grounds that is a "Public liability action," and this Court has jurisdiction under 42 U.S.C. § 2210(n)(2).

In 1992, another division of this Court noted that in claims arising from nuclear exposure, "[t]here [wa]s a split of authority on the role that federal regulations play in an action for damages under state tort law." Landry v. Florida Power & Light, 799 F.Supp. 94, 96 n.7 (S.D. Fla. 1992). Further, the Court in Landry suggested that the split of authority had been "complicated by the Price-Anderson Amendments Act of 1988 . . . ." Id.

However, this Court has reviewed all cases cited by the Court in Landry v. Florida Power & Light, all cases cited by the parties, and all published decisions of courts addressing this issue since Congress passed the Price-Anderson Amendments Act of 1988. All of these courts, including the three circuits of the United States Court of Appeals which have considered the issue, have concluded that federal safety regulations conclusively establish the duty element of a state tort cause of action and that there can be no liability in the absence of a violation of federal standards. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1094 (7th Cir. 1994) (Affirming district court's conclusion "that the maximum permissible radiation dose levels set by federal safety standards provide the applicable standard of care and holding that "even if Illinois would not use federal safety standards as the standard of care . . ., a different state standard would be preempted by federal law.") (citing O'Conner v. Commonwealth Edison Co., 748 F.Supp. 672, 678 (C.D.Ill. 1990)), cert. denied, 114 S.Ct. 2711

(1994); In re TMI Litigation Cases Consol. II, 940 F.2d 832, 859 (3d Cir. 1991) ("[Sltates are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law.") (citation omitted), cert. denied, 112 S.Ct. 1262 (1992), aff'd in part and rev'd in part on other grounds, 67 F.3d 1103, 1107 (3d Cir. 1995) ("'[F]ederal law determines the standard of care and preempts state tort law."), cert. denied, 116 S.Ct. 1034 (1996); Nieman v. NLO, Inc., 108 F.2d 1546, 1553 (6th Cir. 1997) ("[W]e agree with the analyses of preemption in O'Conner and In re TMI II . . . . "); Bohrmann v. Maine Yankee Atomic Power Co., 926 F. Supp. 211, 220 (D. Me. 1996) ("This Court agrees with In re TMI Litig. Cases Consol. II and concludes that federal regulation has occupied the field of nuclear safety law and that federal law has preempted states from imposing any standard of care different from the federal safety standards. Consequently, the Court concludes that federal law sets forth the duty of reasonable care owed to Plaintiffs, and Plaintiffs must establish breach of such standard to recover for the damages claimed on those theories of negligence and negligent infliction of emotional distress."); Corcoran v. New York Power Authority, 935 F. Supp. 376 (S.D.N.Y. 1996) ("This Court adopts the reasoning of the Third and Seventh Circuits' decisions..., which generally stand for the proposition that the appropriate standard of care must be dictated by federal law, including those safety regulations governing exposure to radiation. . . . [I]mposing any other standard of care would contravene the federal interest in occupying the field of nuclear safety . . . . ").

Consistent with the courts' decisions in all of the cases cited supra, this Court concludes that "[e]ven if Florida would not apply the federal safety standards as the standard of care, the federal regulations [establishing the maximum permissible radiation dose levels] must provide the sole measure of [FPL's]

duty in a public liability cause of action." O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1105 (7th Cir. 1994), cert. denied, 114 S.Ct. 2711 (1994). Because Plaintiffs have failed to allege that FPL breached its duty of care by permitting Plaintiff Bertram Roberts to be exposed to an amount of radiation in excess of federally defined permissible dose standards, Plaintiffs have failed to state causes of action for negligence, strict liability, and loss of consortium. See also Bohrmann v. Maine Yankee Atomic Power Co., 926 F. Supp. 211, 221 (D. Me. 1996) ("Plaintiffs' claim pursuant to a strict liability theory is inconsistent with the federal regulatory scheme because Plaintiffs could recover pursuant to such a claim without first establishing that Defendant breached a federally imposed standard of care.").

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion to Dismiss Complaint, filed November 28, 1995 (D.E. #3), is **GRANTED.**

2. Plaintiffs' Complaint is **DISMISSED.**

3. This case is **CLOSED** for administrative purposes, and all pending motions not otherwise ruled upon are **DENIED as moot.**

DONE and ORDERED in Chambers, Miami, Florida, this 6 day of June, 1997.

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

42 U.S.C. 2210

Indemnification and limitation of liability

(a) Requirement of financial protection for licensees.

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

(b) Amount and type of financial protection for licensees

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (A) the costs and

terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (C) the nature and purpose of the licensed activity: Provided, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided*, That such insurance is available to, and required of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further*, That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan shall not be more than $63,000,000 (subject to adjustment for inflation under subsection (t) of this

section), but not more than $10,000,000 in any 1 year, for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further*, That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (o)(1)(D) of this section, payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

(2) (A) The Commission may, on a case by case basis, assess annual deferred premium amounts less than the standard annual deferred premium amount assessed under paragraph (1)--

> (i) for any facility, if more than one nuclear incident occurs in any one calendar year; or
>
> (ii) for any licensee licensed to operate more than one facility, if the Commission determines that the financial impact of assessing the standard annual deferred premium amount under paragraph (1) would result in undue financial hardship to such licensee or the ratepayers of such licensee.

(B) In the event that the Commission assesses a lesser annual deferred premium amount under subparagraph (A), the Commission shall require payment of the difference between

the standard annual deferred premium assessment under paragraph (1) and any such lesser annual deferred premium assessment within a reasonable period of time, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the standard annual deferred premium assessment under paragraph (1) would become due.

(3) The Commission shall establish such requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection including without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(4)(A) In the event that the funds available to pay valid claims in any year are insufficient as a result of the limitation

on the amount of deferred premiums that may be required of a licensee in any year under paragraph (1) or (2), or the Commission is required to make reinsurance or guaranteed payments under paragraph (3), the Commission shall, in order to advance the necessary funds--

(i) request the Congress to appropriate sufficient funds to satisfy such payments; or

(ii) to the extent approved in appropriation Acts, issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(B) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), any funds appropriated under subparagraph (A)(i) shall be repaid to the general fund of the United States Treasury from amounts made available by standard deferred premium assessments, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the funds appropriated under such subparagraph are made available.

(C) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), redemption of obligations issued under subparagraph (A)(ii) shall be made by the Commission from amounts made available by standard deferred premium assessments. Such

obligations shall bear interest at a rate determined by the Secretary of the Treasury by taking into consideration the average market yield on outstanding marketable obligations to the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury may use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31 and the purposes for which securities may be issued under such chapter are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by the Secretary of the Treasury under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(c) Indemnification of licenses by Nuclear Regulatory Commission

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 2002, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $ 500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however*, That this amount of indemnity shall be reduced by the amount that the financial

protection required shall exceed $ 60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

(d) Indemnification of contractors by Department of Energy

(1)(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

(B)(i)(I) Beginning 60 days after August 20, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 [50 USCS 1431 et seq.] entered into between August 1, 1987, and August 20, 1988.

(II) The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or

defense as to charitable or governmental immunity authorized in subsection (n)(1) of this section to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b) of this section.

(2) In agreements of indemnification entered into under paragraph (1), the Secretary may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, to the full extent of the aggregate public liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3)(A) Notwithstanding paragraph (2), if the maximum amount of financial protection required of licensees under subsection b of this section is increased by the Commission,

the amount of indemnity, together with any financial protection required of the contractor, shall at all times remain equal to or greater than the maximum amount of financial protection required of licensees under subsection b of this section.

(B) The amount of indemnity provided contractors under this subsection shall not, at any time, be reduced in the event that the maximum amount of financial protection required of licensees is reduced.

(C) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person, shall be deemed to be amended, on August 20, 1988, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection on August 20, 1988.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $100,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(e) Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (o)(1)(D) of this section, shall not exceed--

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) of this section (plus any surcharge assessed under subsection (o)(1)(E) of this section);

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d) of this section, the maximum amount of financial protection required under subsection (b) of this section or the amount of indemnity and financial protection that may be required under paragraph (3) of subsection (d) of this section, whichever amount is more; and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section--

(i) $500,000,000, together with the amount of financial protection required of the licensee; or
(ii) if the amount of financial protection required of the licensee exceeds $ 60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection of this section and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection (b) of this section, to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) of this section is applicable, such aggregate public liability shall not exceed the amount of $100,000,000, together with the amount of financial protection required of the contractor.

(f) Collection of fees by Nuclear Regulatory Commission

The Commission or the Secretary, as appropriate, is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be $30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 2133 of this title: *Provided*, That the Commission or the Secretary, as appropriate, is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above, a level of $60,000,000. For facilities licensed under section 2134 of this title, and for construction permits under section 2235 of this title, the Commission is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 2134 of this title, taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility. For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than $100 per year.

(g) Use of services of private insurers

In administering the provisions of this section, the Commission or the Secretary, as appropriate, shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission or the Secretary, as appropriate, may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to

the provisions of section 5 of Title 41 upon a showing by the Commission or the Secretary, as appropriate, that advertising is not reasonably practicable and advance payments may be made.

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified any may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this Act. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(i) Compensation Plans

(1) After any nuclear incident involving damages that are likely to exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section], the Secretary or the Commission, as appropriate, shall--

(A) make a survey of the causes and extent of damage; and

(B) expeditiously submit a report setting forth the results of such survey to the Congress, to the Representatives of the affected districts, to the Senators of the affected States, and (except for information that will cause serious damage to the national defense of the United States) to the public, to the parties involved, and to the courts.

(2) Not later than 90 days after any determination by a court, pursuant to subsection (o) of this section, that the public liability from a single nuclear incident may exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section the President shall submit to the Congress--

(A) an estimate of the aggregate dollar value of personal injuries and property damage that arises from the nuclear incident and exceeds the amount of aggregate public liability under subsection (e)(1) of this section;

(B) recommendations for additional sources of funds to pay claims exceeding the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, which recommendations shall consider a broad range of possible sources of funds (including possible revenue measures on the sector of the economy, or on any other class, to which such revenue measures might be applied);

(C) 1 or more compensation plans, that either individually or collectively shall provide for full and prompt compensation for all valid claims and contain a

recommendation or recommendations as to the relief to be provided, including any recommendations that funds be allocated or set aside for the payment of claims that may arise as a result of latent injuries that may not be discovered until a later date; and

(D) any additional legislative authorities necessary to implement such compensation plan or plans.

(3)(A) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(B) The provisions of paragraphs (4) through (6) shall apply with respect to consideration in the Senate of any compensation plan transmitted to the Senate pursuant to paragraph (2).

(4) No such compensation plan may be considered approved for purposes of subsection (e)(2) of this section unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is transmitted to the Senate, the Senate passes a resolution described in paragraph 6 of this subsection.

(5) For the purpose of paragraph (4) of this subsection--

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session

because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

(6) (A) This paragraph is enacted--

(i) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions described by subparagraph and it supersedes other rules only to the extent that it is inconsistent therewith; and

(ii) with full recognition of the constitutional right of the Senate to change the rules at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(B) For purposes of this paragraph, the term "resolution" means only a joint resolution of the Congress the matter after the resolving clause of which is as follows: "That the approves the compensation plan numbered submitted to the Congress on , 19 .", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate.

(D)(i) If the committee of the Senate to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration with respect to such compensation plan which has been referred to the committee.

(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

(E)(i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(F)(i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate to the procedures relating to a resolution shall be decided without debate.

(j) Contracts in advance of appropriations

In administering the provisions of this section, the Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of Title 31.

(k) Exemption from financial protection requirement for nonprofit educational institutions.

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this title, for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the

Commission shall exempt such licensee from the financial protection requirement of subsection (a) of this section. With respect to licenses issued between August 30, 1954, and August 1, 2002, for which the Commission grants such exemption:

(1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $ 500,000,000, including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or

utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

(l) Presidential commission on catastrophic nuclear accidents

(1) Not later than 90 days after August 20, 1988, the President shall establish a commission (in this subsection referred to as the "study commission") in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section.

(2)(A) The study commission shall consist of not less than 7 and not more than 11 members, who--

(i) shall be appointed by the President; and
(ii) shall be representative of a broad range of views and interests.

(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(D) Any vacancy in the study commission shall be

filled in the manner in which the original appointment was made.

(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

(3) The study commission shall conduct a comprehensive study of appropriate means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section, and shall submit to the Congress a final report setting forth--

(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system;

(B) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(4) (A) The chairperson of the study commission may appoint and fix the compensation of a staff of such persons as

may be necessary to discharge the responsibilities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and Title 5.

(B) To the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

(C) The Attorney General, the Secretary of Health and Human Services, and the Director of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and services, including staff, as may be necessary for the effective performance of the functions of the study commission.

(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice or assistance upon request by the chairperson of the study commission.

(E) Each member of the study commission may receive compensation at the maximum rate prescribed by the Federal Advisory Committee Act (5 U.S.C. App.) for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including per diem in lieu of subsistence under sections 5702 and 5703 of Title 5.

(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the 2-year period beginning on August 20, 1988.

(6) The study commission shall terminate upon the expiration of the 2-month period beginning on the date on which the final report required in paragraph (3) is submitted.

(m) Coordinated Procedures for prompt settlement of claims and emergency assistance

The Commission or the Secretary, as appropriate, is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability. The Commission or the Secretary, as appropriate, and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission or the Secretary, as appropriate, shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

(n) Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which--

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission or the Secretary, as appropriate, has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section, or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

The Commission may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection,

or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of Title 28, United States Code, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(3) (A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if--

(i) a court, acting pursuant to subsection (o) of this

section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount in the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B) (i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel--

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not

inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

(o) Plan for distribution of funds

(1) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under the applicable limit of liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section:

(A) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(B) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance

with the plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (C); and

(C) The Commission or the Secretary, as appropriate, shall, and any other indemnitor or other interested person may, submit to such district court a plan for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a later time, and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission or the Secretary as appropriate, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(D) A court may authorize payment of only such legal costs as are permitted under paragraph (2) from the amount of financial protection required by subsection (b) of this section.

(E) If the sum of public liability claims and legal costs authorized under paragraph (2) arising from any nuclear incident exceeds the maximum amount of financial protection required under subsection (b) of this section, any licensee required to pay a standard deferred premium under subsection (b)(1) of this section shall, in addition to such deferred premium, be charged such an amount as is necessary to pay a pro rata share of such claims and costs, but in no case more than 5 percent of the maximum amount of such standard deferred premium described in such subsection.

(2) A court may authorize the payment of legal costs under paragraph (1)(D) only if the person requesting such payment has--

(A) submitted to the court the amount of such payment requested; and

(B) demonstrated to the court--

(i) that such costs are reasonable and equitable; and
(ii) that such person has--
(I) litigated in good faith;
(II) avoided unnecessary duplication of effort with that of other parties similarly situated;
(III) not made frivolous claims or defenses; and
(IV) not attempted to unreasonably delay the prompt settlement or adjudication of such claims.

(p) Reports to Congress

(1) The Commission and the Secretary shall submit to the Congress by August 1, 1998, detailed reports concerning the

need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

(2) Not later than April 1 of each year, the Commission and the Secretary shall each submit an annual report to the Congress setting forth the activities under this section during the preceding calendar year.

(q) Limitation on awarding of precautionary evacuation costs

No court may award costs of a precautionary evacuation unless such costs constitute a public liability.

(r) Limitation on liability of lessors

No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason of an interest as lessor of such production or utilization facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability.

(s) Limitation on punitive damages

No court may award punitive damages in any action with

respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

(t) Inflation adjustment

(1) The Commission shall adjust the amount of the maximum standard deferred premium under subsection (b)(1) of this section not less than once during each 5-year period following August 20, 1988, in accordance with the aggregate percentage change in the Consumer Price Index since--

(A) August 20, 1988, in the case of the first adjustment under this subsection; or

(B) the previous adjustment under this subsection.

(2) For purposes of this subsection, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers published by the Secretary of Labor.